

APPENDIX

United States Court of Appeals For the First Circuit

No. 02-1169
Dt.Ct.No. 01-01452

EDGAR ALFONSO CUELLAR,
Petitioner, Appellant,

v.

UNITED STATES,
Respondent, Appellee.

Before

Selya, Lynch and Lipez,
Circuit Judges.

JUDGMENT

Entered: April 9, 2002

After a thorough review of the record and of the appellant's submissions, we deny the request for a certificate of appealability. Appellant has no valid claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), because he was sentenced within the default statutory maximum found at 21 U.S.C. § 841(b)(1)(C). See United States v. Baltas, 236 F.3d 27, 41 (1st Cir.), cert. denied, 532 U.S. 1030 (2001) (no Apprendi error where defendant sentenced within default statutory maximum contained in 21 U.S.C. § 841(b)(1)(C)). Moreover, as part of the plea agreement, he conceded that he should be sentenced based on a quantity of one kilogram of heroin; so even if an Apprendi error could be established, he could show no prejudice. See United States v. Duarte, 246 F.3d 56, 63-64 (1st Cir. 2001). Accordingly, his claim that his attorney provided ineffective assistance for failing to raise the Apprendi issue is meritless.

Likewise, his claim that his attorney allowed him to plead guilty to an offense for which he was not guilty is belied by his admissions under oath that he did indeed conspire to possess heroin with intent to distribute. His claim that his attorney should have challenged any sentencing disparity is meritless, as his sentence was at the bottom of the applicable sentencing range. United

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States v. Rodriguez, 63 F.3d 1159, 1168 (1st Cir. 1995) ("Absent misapplication of the Guidelines, the mere fact of [a] disparity is of no consequence.").

The request for a certificate of appealability is denied and the appeal is terminated.

By the Court:

Richard Cushing Donovan, Clerk

JANICE M. O'NEIL

By: _____
Chief Deputy Clerk.

[CC: Messrs. Cuellar, Bazan-Gonzalez, Perez-Sosa, and
Vega-Pacheco,]